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In the Supreme Court of Pennsylvania,

EASTERN DISTRICT.

LIBRARY COMPANY OF PHILADELPHIA

vs.

WILLIAMS.

BRIEF OF ARGUMENT FOR APPELLEES.

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In the Supreme Court for the Eastern District of Pennsylvania.

IN EQUITY.

The Library Company of Philadelphia vs. *Williams.*	July Term, 1871. No. 1.

BRIEF OF APPELLEES (COMPLAINANTS BELOW).

The case lies in a nutshell. An Examiner's report of 239 pages, a Master's report of 94 pages, an oral argument by six counsel for nearly four days, and a printed paper book of 69 pages, can all be reduced—as was done by the court below—to two simple questions,—one of law, the other of fact.

I. The question of law: May a trustee in whose discretion property is to be administered for the benefit of a third person, so bind that discretion in advance, that when the occasion arises for its exercise, it shall be taken to be non-existent?

II. The question of fact: Has the discretion given in this case been so bound?

I. The question of law.

Once admit the premise that a party interested in the exercise of a discretion by a trustee, has the right to demand that such exercise should be made from pure and not corrupt motives, and all the law of this case logically follows until it comes down to this—be the motive the worst or the best, still, after all, the discretion must be an existing one, unfettered and not bound.

1. Have the complainants an interest in the exercise of the defendant's discretion?

It is averred in the bill that this interest is "in the nature of property,* nor can it be denied. By the will, the library building, when completed, is to be conveyed to the complainants. Our interest, therefore, which is the right then to accept the building, includes the consequent right to ask that it be not placed in a locality which would absolutely prevent our accepting it at all. If a testator should give to an executor money wherewith to build a house for his daughter, could any one doubt that she had an *interest* in the locality of the house? If one were to give to an executor money wherewith to build the Land Office, could any one deny that the Commonwealth had such an *interest* in the locality as would give it a standing in court to prevent the building being put, from corrupt motives, in an improper place?

This is not upon the question of our *right to relief*—it is purely upon the question of our *interest*—our right to a standing in court. It is not even arguable,—and was, in the argument, conceded by the learned senior counsel for the defendant. In the language of the Master, (impliedly adopted by the court,) "The will, therefore, creates an interest in the plaintiffs which this court will protect, and the discretion allowed to the donee of the power is so inseparable from the duty to select and build, as to make the defendant, to all intents, subject, as to both, to the law applicable to trusts."†

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* Bill, page 20.
† Master's report, page 74.

2. How can such a discretion as this be exercised?
It must be either
(*a.*) By the testator, or
(*b.*) By the donee of the power.

(*a.*) By the testator.

Apart from nuncupative wills, the law knows but one way by which a testator can signify "the disposition of his property, to take effect after his death." By our law "Every will shall be in writing * * and shall be signed by the testator at the end thereof * * *otherwise such will shall be of no effect.*" And further, "No will in writing, concerning any real estate, shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing declaring the same, executed and proved in the same manner as is hereinbefore provided, or by burning, cancelling, &c."*

No one would be suffered to argue that where a testator's will gave his property to A., a verbal direction to his executor to give it to B. was of the slightest effect.

And hence, in the present case, no one would be suffered to argue that the testator could vary, by parol, the written will as to either of four things—

1. The *estate* devised,—for example, that the Library should only have one-half instead of all his estate.

2. The *purpose* for which it was devised,—for example, that it should be for some purpose "inconsistent with the legitimate purposes of a public library."†

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* Act of 8th April, 1833, Purdon, page 1016.

† Thus, after forbidding the formation of any museum, gallery, and the like, the testator said, "These are objects foreign to and inconsistent with the legitimate purposes of a public library, and it is only for the preservation, extension, and free and convenient use of such a library, without any ambitious or pretentious display, that it is desired to make provision." Master's report, page 17.

3. The persons *to whom* it was devised,—for example, that it should be the Mercantile Library instead of the Philadelphia Library.

4. The mode *in which* it was devised,—for example, that the building should or should not be fire-proof, that it should or should not be in a particular locality,* or that the executor should or should not have a discretion to choose the locality.†

As to all of these, of course no parol proof could be admitted without overturning what have become general principles of jurisprudence.‡

Perhaps the strongest instance of the enforcement of the Statute of Wills was the late case in this court of Alter's Appeal, in which a husband and wife made mutual wills, each giving to the other all his and her estate. The evidence was conclusive of the fact that, by mistake, *each signed the other's will*, and yet the wife, who died first, was held to have died intestate, her will not having been "signed by her," and even an act of the Legislature, passed for the purpose, was held insufficient to help the case.

And the most perfect illustration of the *effect* of the statute occurred in the memorable cause before Lord Brougham. The draft will, which had been approved, showed that a line had been omitted in engrossing the will that was signed. Counsel denied the right of the Chancellor even to *look at the draft*, to ascertain whether there had been a mistake. He, arbitrarily, did look at it, and was satisfied there had been a mere mistake by a clerk; but he admitted he could not correct it without repealing the statute which prohibits *proof of the will* of a testator, except by a writing signed at the end.

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* "In trust, to select and purchase a lot of ground, not less than one hundred and fifty feet square, situate between Fourth and Fifteenth and Spruce and Race streets, in the city of Philadelphia."—*Testator's Will.*

† "I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot, and select any situation he may deem most expedient, without regard to any provision of my will or codicils."

‡ And even in this particular case, if such variations had been *in writing*, it would, under the statute of 1855, have been of no effect because made within thirty days of the testator's death. See act of 26th April, 1855, Purdon, 146.

(*b*.) By the donee of the power or discretion. Of course, the distinction is obvious between a mere power, and a power in the nature of a trust. As to the former, it is well settled that equity will not compel its execution, and equally well settled that it will aid its defective execution; but as to powers in the nature of trusts it is different, it being considered that "a person who creates a trust, means it shall be executed at all events,"* and it is, of course, solely of powers in the nature of trusts that we are now speaking.

No one doubts the general doctrine that a court will not control the discretion of a trustee; but it is equally true that "the donee of a power is not the absolute owner of the property which is subject to the power."† Thus it is familiar that

1. A court will *compel the exercise* of a discretion.

As to this, Lord Eldon's language may suffice:—

"The principle of all these cases is that if the power is a power which it is *the duty* of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and, not having *a discretion* whether he will exercise it or not, the court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it." ‡

In the present case, if the defendant should say "My discretion is that the library company are better off where they now are, and I will choose no lot," would it be seriously argued that this court could not compel the exercise of his discretion, and if he would not choose himself, would choose for him?

In Erisman *vs.* Directors of the Poor, 11 Wright, 509, where an estate was given to a trustee to apply the income in the pur-

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* Per Lord Wilmot, in Attorney General *vs.* Downing, Wilmot's R., 23; Perry on Trusts, § 248.

† Per Lord Justice Turner, in Topham *vs.* Duke of Portland, 1 De Gex, Jones & Smith, 568.

‡ Brown *vs.* Higgs, 8 Vesey, 574, quoted by the Master, pages 73–4.

chase of the necessaries of life for the support of a woman, and also the principal, "if urgent necessity should require;" the woman was in indigent circumstances, became insane, and was committed to the State hospital, and the trustees having refused to apply the funds to her support, this court said:—

"The first object of the testatrix's bounty was this unfortunate woman, and the will must be so interpreted. Had she remained of sound mind, and a case of urgent necessity arisen to which the interest of the bequest would have been inadequate, no one can doubt but that her interest in it would have been such as to entitle her to call on the trustee for the application of a portion or the whole of the legacy, as the case may require. * * * *The objection that this dispenses with the discretion of the trustee has no merit.* This discretion is but a legal one, and whenever the law determines that a proper case has arisen in which the trustee's discretion should have been exercised in a particular way, he will be constrained to act in accordance therewith."

2. A court will prevent an *improper* exercise of a discretion.

In McFarland's Appeal, 1 Wright, 205, the court, speaking of a discretionary power of sale, said, "If it had been a matter of discretion, still an unreasonable exercise of it could be corrected by the supervision of the court."

So in Pulfress *vs.* African Church, 12 Wright, 210, already cited by appellants, Strong, J., said, "If it were manifest that their honest discretion is not exercised, it might become the duty of the court to interfere."

The subject is too trite to be followed further. The text books are full of it, and perhaps the best illustration will be found in a class of cases not very usual here, viz., where the consent of a trustee is necessary to a marriage; and when the trustee either declines to exercise any discretion at all, or refuses his assent from motives of personal pique or resentment, the court exercises its supervision according to the course and practice of chancery, by a reference to a master, to inquire and report whether the marriage be a proper one.*

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* In Hill on Trustees, * 494 to 502, most of the cases on the subject of controlling the improper exercise of a power are collected.

3. So, too, a court will interfere where a trustee has *bound* his discretion, and this, without regard to the motive and intention which induced the result. It is sufficient for the court that the exercise be not with the eye single to the benefit of the appointee.

Now, the donee of a discretion may bind it in one of there ways:—

1. By corrupt motives.

2. By motives personal to himself.

3. By the highest and best motives.

And the law knows no difference as to the result,—all are equally, in technical language, "a fraud upon the power."*

The books contain cases as to each of these classes:—

1. By corrupt motives.

The jurisdiction of equity as to such a case was exercised more than a century ago. The Lord Sandwich whose case was referred to by Lord Eldon and Sir E. Sugden, (for the case seems to be unreported,) was no doubt the celebrated Lord Sandwich (the fourth Earl) of whom others than Walpole have told

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* The familiar leading case as to "fraud upon a power" is Aleyn *vs.* Belchier, 1 Leading Cases in Equity, *304, decided by Lord Worthington (then Lord Keeper Henley) in 1758, and it is said by the editor to have been "decided upon the well-established principle that a person having a power *must execute it* bona fide *for the end designed*, otherwise the appointment, although unimpeachable in law, will be held corrupt and void in equity." In the notes to this case many of the authorities are collected. Whatever may have been the indisposition of American courts to follow the doctrine up to that of illusory appointments, (now abolished by statute,) the principle on which it is based was never doubted in this country. In 1824 Chancellor Desaussure said, "This construction is according to a rule in equity which has long prevailed, and is of considerable extent and application. It is that where the power of electing is given to a trustee, as to the rights of a third person, the trustee is bound to exercise that power most beneficially for the *cestui que use*." Haynesworth *vs.* Cox, Harper's Eq. R., (L. Cases,) 119.

such disreputable stories.* In McQueen *vs.* Farquhar, 11 Vesey, 480, Lord Eldon referred to the case, and Sir E. Sugden, then Chancellor of Ireland, thus spoke of it:—

"But even if such an abuse should be attempted, a court of equity is not powerless to guard against it. Lord Sandwich's case decided this. There, a father who had a power of appointment among his children, supposing that one of them was in a consumption, executed his power in favor of that child, and the court declared the appointment to be void, being of the opinion that the object of the appointor when he made the appointment was that he might himself have the chance of getting the share as administrator of his child." Keily *vs.* Keily, 4 Drury & Warren, 55.

Lady Wellesley *vs.* The Earl of Mornington, 2 Kay & Johnson, 143, was almost identical with Lord Sandwich's case.

On the Earl of Mornington's marriage, in 1812, estates were settled to the husband and wife for life, with a power reserved to him to appoint £40,000 among the children of the marriage. In 1850, the Earl appointed the greater part of this sum (which, it will be remembered, had been his own money) to his son James, who soon after died. The bill was filed by one of the other children to set aside this appointment, on the ground that it was well known to the Earl that James' life was despaired of; that the appointment was made by him for his own benefit and advantage, being the next of kin of his son, and without regard to the interests of his other children. The Earl, in his answer, swore distinctly that his only motive in making the appointment was, that having reason to fear that James might continue in an infirm state of body and mind, he was anxious to make such a provision as should enable him to live in comfort, and that he exercised a discretion which he was entitled to exercise under the settlement. And in a subsequent affidavit he swore that before the appointment he had been informed that James had, some time before, executed a will bequeathing all his estate to "a lady

* Lord Sandwich married in 1740 and died in 1792, so that the decision was probably made at least a hundred years ago. One of his mistresses married Dr. Dodd, and another was shot in a hackney-coach.

with whom he was then living." The evidence showed that James was in "a deplorable state of health," a dissolute man, with mind and body broken down by intemperance, and a hopeless lunatic, and that the Earl had this from James' own physician. He, moreover, owed £3000.

The whole of the opinion of the court, (Sir W. Page Wood, afterwards Lord Hatherley,) setting aside the appointment as "a fraud upon the power," deserves attention. Without hearing the complainants' counsel in reply, the decision was given, and was

"rested on the ground of fraud on the part of the parent; I mean not simply upon the ground of the appointments not being for the child's benefit, but upon the broad ground that the parent executed these appointments, not with any intention of benefiting the object of the power, but to secure to himself the benefit that might result from the appointments so executed. * * I quite concede that deeds are not to be set aside for fraud on vague suspicion, and the case I have been referred to* was that and nothing more. A trustee had said, 'I suspect some arrangement has been come to between this lady and her daughter, and I will not hand over the fund.' The answer of the Vice Chancellor was, 'let the parties who question the appointment come forward and question it. I shall not, on this vague surmise, allow the trustee to withhold a fund which has thus been appointed, merely because he says he entertains vague suspicions. Let the parties who are interested in the discussion come forward?' That is what the parties who are interested in the discussion are doing here. They are coming forward to dispute it, and the dispute is distinctly put on this ground. 'You have made this appointment of £27,000, without any intention whatever of benefiting your son. You have made it for the sole purpose of obtaining a benefit to yourself.' The case must rest on ground as high as that, and I put it as high as that. I ask, can anybody, if this case were before a jury, suppose that the defense which is made would be a satisfactory answer with reference to an appointment to a person in this imbecile condition? A lunatic who was in a weak and infirm state of health brought on by excesses. The father had been informed throughout, that the weakness and infirmity of his son's health was so occasioned, and having made due inquiries at two previous periods as to the state of his health,

* Campbell *vs.* Horne, 1 Young & Collyer's Chan. R., 664.

he makes no inquiry at the time when he is about to execute these deeds. Can I believe, or can anybody believe, that this was done for the purpose of paying the supposed amount of debts, three or four thousand pounds, when one finds an appointment made of £27,000, and when one observes (which is of considerable importance) the course that was taken after the appointment was so made? * * Lord Mornington suggests that it was impossible he could have a notion that he was to be the party to benefit by these instruments, because he had heard, and he believed, that his son had previous to his lunacy made a will, by which he had given the whole of his property to a person with whom he had lived. I confess that it is one of the most extraordinary statements in this case, that Lord Mornington, believing his son's debts to be only £3000, did, to the detriment of his daughter Lady Victoria, appoint to him in this state, £27,000, in the belief that the surplus would go to a woman with whom his son had been living. Anything more monstrous and more incredible was never stated in a court of justice, * * but it proves to what statements a person is driven who makes a statement of this sort in order to justify the act which he has committed. * * Holding, therefore, as I do, that the appointment has been made by Lord Mornington, not for the benefit of his son, but for his own benefit, it seems to me consistent with the whole class of authorities, and to follow the principle of the class of authorities in which the object of the power was capable of entering into a bargain with the father, which this unfortunate gentlemen was not, to hold that this is a fraud upon the power; that it is an exercise of the power by which the father endeavored to obtain a benefit for himself, which, of course, the court will not allow him to retain, and the consequence is, that the deeds must be set aside, and Lord Mornington must pay the costs of this suit."

Less strong as to motive, and therefore more strongly in our favor as to the doctrine, is the case of Marsden's Trusts, 4 Drewry, 594, decided by Vice-Chancellor Kindersley in 1859. On the marriage of Mr. and Mrs. Martin, their marriage settlement gave her a power of appointment of certain stocks among the children. Some years after, Mrs. Martin, wishing to make a better provision for her husband, proposed to appoint the whole property to one daughter upon condition that, at her majority, she should give her father one-half absolutely, and a life interest in the other

half. Being advised that this could not legally be done, she appointed absolutely to the daughter.

"It appeared," says the report of the case, "that the intention of Mr. and Mrs. Martin was, that Mr. Martin should, after the death of Mrs. Martin, inform the daughter of the object to effect which the appointment had been exercised in her favor, leaving it in the discretion of the daughter to carry out her mother's intentions. It was admitted that Isabel Charlotte Martin was entirely ignorant of the execution of the appointment in her favor till after the death of Mrs. Martin."

On the daughter attaining majority, she applied to the trustees under the settlement for the stock, but the other children raising a question as to the validity of the appointment, the trustees paid the fund into court, and she petitioned for leave to take it out.

It was thus urged on her behalf:—

"Mrs. Martin had a discretion given her by the power to exercise it in favor of any of the children to the exclusion of the others, and she has accordingly appointed in favor of the eldest daughter. There has been no bargain between the appointor and the appointee, for it is admitted that the daughter did not even know of the appointment in her favor till after the death of her mother; and whatever may have been the intention of Mrs. Martin in making the appointment, the daughter is not even morally bound to carry out such intention, neither is the appointment in her favor vitiated thereby. No fraudulent intention on the part of the appointor in exercising her power has been proved, and the court will not interfere with the exercise of the discretion given to the donee of the power, unless such a fraudulent intention has been actually proved. No presumption, however strong, is sufficient."

The Vice Chancellor said,—

"The question raised by the petition is, whether a certain execution of a power of appointment is to be considered as valid, or whether it is void as being a fraud on the power. The petitioner is the person in whose favor the power has been exercised, and she insists that the appointment is valid, and under the circumstances not a fraud on the power. [The Vice Chancellor then stated the facts of the case.] On the

face of the instrument, the power appears to have been well exercised, and the question is, whether under the circumstances it is in effect a fraud on the power. The power in question is only one form of a discretionary trust to be exercised for the benefit of certain objects, or some of them. The objects of the power are the children of the marriage; and the purpose of the settlement was to make a provision for their benefit, but at the same time to reserve to the mother such a power as would keep the children under control, and to enable her to distribute the property among them in such manner as in her opinion their respective wants and interests, and the exigencies of the case, might require. The same general principles which are applicable to discretionary trusts in general, are applicable to this particular species of discretionary trust. Unless it can be shown that the trustee having the discretion exercises the trust corruptly or improperly, or in a manner which is for the purpose, not of carrying into effect the trust, but defeating the purpose of the trust, the court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion—though suspicion is ground for jealous investigation, if it be mere suspicion—and matter amounting to a judicial inference or conviction from the facts, the court will not act upon it. But if, on the other hand, it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly or for a purpose which defeats instead of carrying into effect the purposes of the trust, then the court will not permit the exercise of such a power to prevail. * * * Now it appears to me, that looking at the authorities, and in the view I have taken of the evidence, the case comes within that class of cases in which this court says there has been a fraud upon the power, inasmuch as it has been exercised in such a way as to defeat the purpose for which it was given."

"In some of the cases which have been cited, there has been a direct bargain between the donee of the power and the person in whose favor it is exercised, under which the donee of the power was himself to derive a benefit; and certainly there has been nothing of that kind in this case. In my opinion, however, it is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same whether the appointee was aware of it or not; and the case of Wellesley *vs.*

Mornington shows that it is not necessary, in order to bring the case within the scope of the jurisdiction on which this court acts, that the appointee should be aware of the intentions of the appointment or of its being actually made.

"Neither is it necessary that the object should be the personal benefit of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the trust was created as if it had been for the actual benefit of the donee himself. I must hold that this exercise of the power is void, as being what is technically called a fraud on the power; and I cannot grant the prayer of this petition, which must be dismissed with costs."

These cases have been selected as most strikingly illustrative of the doctrine. There are many others:

In Daubeny *vs.* Cockburn, 1 Merivale, 626, decided by Sir William Grant in 1816, it was held that an appointment to one child exclusively, upon a secret understanding that that child should re-assign a part of the fund to a stranger, was a fraud upon the power, and void not only to the extent of the sum appointed, but *in toto*.

So in Jackson *vs.* Jackson, Drury, (Irish Ch.,) 91—decided by Sir E. Sugden, then Chancellor of Ireland, in 1843—a father, the donee of a power of appointment, appointed to one child under an arrangement by which he was to receive part of the fund, and it was unhesitatingly set aside.

"To render such an appointment fraudulent, it is not necessary that it should be wholly for the benefit of the father, it is enough that it is partially so; and if it be either wholly or partially in the father's favor, if any benefit be derived to the father himself through the instrumentality of that power of appointment, this court holds that though in legal form it is exercised in favor of the son, it is a fraudulent and void disposition."

And in Arnold *vs.* Hardwicke, 7 Simons, 343, it was held that where the donee of a power appointed the fund to one of the objects, with the understanding that the latter was to lend the fund to the former *on good security*, the appointment was bad.

These cases illustrate the doctrine of "fraud upon a power" where the motive is a corrupt, *i. e.*, a pecuniary one.

2. Where the motive, though not pecuniarily corrupt, is one personal to the donee of the power.

Dummer *vs.* The Corporation of Chippenham, 14 Vesey, 245, decided by Lord Eldon in 1807, is the leading case as to this.

The corporation was seized of an estate for the support of a free school for the education of twelve poor boys, and the appointment of the schoolmaster was in the bailiff and a majority of the trustees, and the plaintiff had for years been appointed to, and held that office. The defendants turned him out, on the alleged ground of bodily disease, but really, as charged in the bill, "actuated by resentment and party spirit" because he had voted for a member of parliament against their wishes. The bill prayed for a discovery in the usual form, and an injunction, and to this the defendants demurred. The Chancellor, in his first judgment delivered after the argument, said:—

"If these persons, trustees of a school for charitable purposes, were acting as individuals, the court would have no difficulty in dealing with them, and there is no doubt the court will compel a corporation, who are trustees, to act as they ought. The principle upon which this case is argued, goes to this length, that if it could be made out by discovery from each of these persons, supposing no combination in the answer, that they turned out this schoolmaster not upon any well-founded opinion, but influenced by a corrupt motive, that discovery should be shut out."

And the next day, in a more elaborate judgment, he overruled the demurrer.

The remarkable thing in this case is that the Chancellor so took for granted the result that would follow, in case the answer should admit the facts charged in the bill, that he did not even discuss the question.

"The question upon this case is, whether this court can entertain a bill against these individuals, as parties to obtain a discovery whether though their means, so manifested, there was

such an abuse of the discretion vested in the corporation, as trustees, as this court will reform."

Implying, of course, that if such an abuse *were* made out, the court *would* interfere.

Nearly half a century later, the law was equally so taken for granted in the case of Beloved Wilkes' Charity, 3 McNaughten & Gordon, 440,* which is cited at such length by the Master† that the briefest reference to it will suffice here. The ministers of certain parishes had a right to apply certain funds to educate a boy for the ministry. They rejected a boy named Gale and appointed another, and Gale's father filed a bill to set aside their appointment, on the ground that the motive was the belief of the ministers "that the sons of farmers and agriculturalists were not desirable persons to be educated for the ministry of a church." The only difficulty in the case was as to the proof, for the law was taken for granted on both sides. The appointment was set aside by Vice-Chancellor Cranworth, but this was reversed on appeal, on the ground that there was *no evidence* of any other than a *bona fide* exercise of the discretion. "It is evident, from the judgment of the Chancellor," says the Master, "that if it had been shown that the trustees had laid down a rule that the sons of farmers were not persons in a situation of life fit to be the objects of the charity, he would have sustained the order notwithstanding the plenary discretion given in the will."‡

3. Where the motive is one of the highest and best imaginable.

Thus, in the Duke of Portland's case, the motive was filial obedience. The whole case turned upon the fact that the Duke hated his daughter's attachment to Col. Topham—that this was, of course, known in the family (as it could not help being known)—

* The case is much more fully reported in 7 English Law & Eq. Rep., 85.

† Master's Report, page 77.

‡ *Id.*, page 79.

that not satisfied with her promise not to marry while he lived, he, in order to prevent the marriage after his death, contrived the deed of trust—and when, after his death, she did marry, his son made the appointment just as his father intended that he should make it in that event. And in this case, as well as in the other cases cited, there was no difficulty as to the law—it was taken for granted.* The only trouble was as to the facts, because in every case, except the present one, where human motive is the unknown quantity, and the thing after which a court is groping, it is difficult to discover what particular springs of action have produced the result. Our learned opponents, in their statement of this case, have said, "Nothing appears to have been said by the late Duke, before the creation of the power, as to the manner of its exercise," from which they would seem to have us infer that the deed of trust was a harmless creation of his own for no ulterior object, and that his children were equally simple-minded. Why, the only point on which the whole case hinged was the hatred of the Duke to the match, and the descent of his hatred upon his son and other daughter, filially adopted and made their own hatred. Of course, the family dissension must have been something terrible. Lady Mary, who, the Peerage tells us, was born in 1809, became engaged to Col. Topham in 1843, and for eleven years after, her filial obedience mastered her love. But her father died in 1854, and instantly she married, and, as instantly, her brother fired the piece which his father had loaded in 1848.†

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* The case was argued by the very ablest men at the bar, among others, the present Chancellor (then Sir Roundell Palmer), Lord (then Sir Hugh) Cairns, Mr. Rolt, Q. C., Mr. F. Philipse Morris, Mr. Giffard, and Sir Selwyn-Ibbotson (then Mr. Selwyn).

† The mild way in which our opponents have tried to state this cause makes the reasoning of all the judges who decided it almost idiotic. Thus we are told:

"The old Duke of Portland conveyed certain property by deed of trust to his son, the present duke, and authorized him to appoint it between two of his daughters, Harriet and Mary, or to appoint it to one in exclusion of the other, and subject to such restrictions as the donee of the power might think fit. Before this, *it had come to the knowledge* of the duke that his youngest daughter (Lady Mary) had entertained proposals of marriage from Col. Topham. He did not think fit to approve of the match, and strongly expressed his opinion, threatening that he would, so far as he had the power, leave away everything from her. She promised not to marry in his lifetime. Nothing appears to have been said by the late duke,

It is idle to suppose that, during those eleven years, the well-known obstinate Bentinck blood was not strongly stirred. No case was ever more fully reported as to the facts, and no one concerned in the cause ever dreamed of denying that the Duke's hatred of the marriage was as strong as was the obedience of his children. The struggle in the case was to discover the spring of action—the motive which induced the appointment away from Lady Mary. For the new Duke said, "I made the appointment of my free will and accord; I have sworn it, and who shall gainsay it?" The Topham's said, "No! it was made under the pressure of filial obedience." Now, in the case where Lord Mornington swore that he made the appointment out of tender regard for his son's comfort, the Chancellor said, "I don't believe you." In the Portland case, one of the judges politely said the same thing of the Duke:—

"It has been pressed upon us, that, secondly, I must discredit the statements made by the Duke's answer and affidavit. As to this, I hold that every man must be presumed to intend and mean that which is the natural and necessary effect of his acts."

But others of the judges went further, and said that they "gave absolute credence to all that the Duke and Lady Harriet swore to;" in other words, they said, "You may *think* that you are under no pressure, and you may swear to it; but you deceive yourselves." Just as in the present case, no one doubts that the defendant, from the bottom of his heart, verily believes that his discretion is as unbound as if the testator had never mentioned Broad and

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before the creation of the power, as to the manner of its exercise. No previous promise was given."

The case came up five times,—three times under the first appointment, and twice under the second,—and is reported as follows:—

Under the first appointment—

Topham *vs.* Portland, 31 Beavan, 525, Roll's Court, Sir J. Romilly, M. R.;

Same *vs.* Same, De Gex, Jones & Smith, 517, L. J. Knight Bruce;

Portland *vs.* Topham, 11 House of Lords, 32, Lords Westbury, Cranworth, St. Leonards, and Chelmsford.

Under the second appointment—

Topham *vs.* Portland, 5 Law Rep., Chanc. App., 49, note, V. C. James;

Same *vs.* Same, on appeal, Lord Hatherley and L. J. Giffard.

Christian streets; but while in the same breath he tells us that his conscience will not allow him to "violate a pledge given under circumstances which render it as sacred as an oath," human intellect is inadequate to grapple with this inconsistency.

"Therein and thereby," said the Court below, "he *proves* the indelible stamp made upon his mind. Conscience, resting under an obligation strong as an oath, bound him to the observance of his promise. With that deep sense of moral obligation resting upon his conscience, he assumed the duties of the trust."

If the Duke of Portland had ever said, or had written it down, that he had promised his father to appoint the property away from Lady Mary if she married Col. Topham, and that he regarded that promise as binding on his conscience as an oath, his counsel would not have been even listened to. Once given the facts, and the law followed as of course.

"We have held all these appointments to be void," said the Court, "as being a fraud upon the power under which they were made—fraudulent in the eye of this court, without reference to the question whether they were morally so or not."

In the House of Lords, after Sir Hugh Cairns' argument had been shattered by the questions put to him, and the court had declined to hear an argument for Lady Mary's counsel, these sentences were the opening of the judgment pronounced by one more familiar to us by the name of Sugden than by that of Lord St. Leonards:—

"My Lords, the rules on this subject are so well settled that it is quite unnecessary to go through any authorities on the subject. A party having a power like this, must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects or attempts to give it in that character."

And when the second appointment was also set aside as being made "from the old understanding—from the old purpose—from

the old influence," Lord Justice Giffard thus closed his judgment:—

"I have only to add that if the object of the appointment in this case had been simply the benefit of the Duke of Portland himself, I am persuaded he would never have come into court. The real object, though morally speaking, far different, must, legally speaking, be considered on precisely the same principle as though he sought a benefit for himself; for the object is to bring about a state of things not warranted by the power. It may be that, on consideration, the Duke of Portland will concur in the opinion that the matter may from henceforth be well left at rest."

It is not worth while to analyze our opponents' attempted distinction between this case and the present one. The case speaks for itself.*

But if it should be argued that while a contract with a stranger for a reward, or even the laudable desire to benefit a friend may be "a fraud upon the power," yet, inasmuch as the obligation in this case was imposed by *the testator himself*, the result will be different, the answer is obvious; it all comes back to the same thing; the testator's disposition of his property, including any variations of disposition, must be made in the only way known to the law, namely, by writing it in the will. Else, of course, it is an evasion of the Statute of Wills.

And this is the answer of a lawyer to that argument so attractive to the layman and to the feminine mind, "Why, you seek to prevent the executor from doing the very thing which the testator had set his heart upon." So long as there have been Statutes of Wills, so long have courts refused to allow them to be varied by parol—for where could courts stop? It has been since the decision in this case that one of the counsel heard a daughter,

* And even *at law*, nothing is better settled than that a colorable exercise of a discretion, or a pretended exercise, is no exercise at all, and mandamus will lie; Regina *vs.* Mayor of York, 1 Ellis & Black., (Q. B.,) 594, and, even a refusal to act under a mistaken notion of a rule of law is no exercise; Moffat *vs.* Dickson 13 Com. Bench, 543.

to whom her father had, to her surprise, not left her a certain house, indignantly ask, " What are a few words written in a will, compared to the conversations of a lifetime?"

II. The question of fact. Has the discretion in this case been bound?

The court below spoke of the " uncontradicted evidence," and indeed, the case might almost have been argued upon bill and answer. The testimony taken before the Examiner was only done out of abundant caution to exclude possible conclusions arising out of the answer.

The defendant made a promise to the testator to build the library on a particular site " and nowhere else;" and he has told us, in his letter, in his answer, and in his evidence, that he regards this promise " as sacred as an oath." Now, there are men to whom integrity is an instinct, and moral sense, spontaneous. And for this very reason, as was conclusively put by the Court below, " the greater the integrity, the higher the moral sense, the stronger would be the obligation upon the conscience."

To a coarse mind, the pressure on the discretion from having received a certain sum of money for choosing one site, would be effaced by the greater pressure from subsequently receiving a larger sum for choosing another; but, to a man of instinctive integrity, the slightest pledge of faith is ineffaceable, and from thenceforth there is "no variableness, neither shadow of turning." And the very fact that the defendant tells us, "I believe that I am just as able to determine whether the site at Broad and Christian streets is proper and beneficial, as if I had made no promise at all," * is, to a human mind, the most overwhelming and conclusive proof that his discretion is absolutely gone.

"Certain facts," said the Court below, "which the wisdom of ages has recognized as influencing the judgment of mankind generally, create a conclusion of law that they will influence the judgment of each individual. Apply the law and reason to this case, testing the uncontradicted evidence by all those principles

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* Defendant's answer, page 28.

which I have ever been taught to believe influence the human mind and control the actions of men, it does establish such a state of facts as would naturally and reasonably restrain and trammel the free judgment of the donee of a power."

There are cases in which the law raises a presumption, against which it will listen to nothing. A juror who has received money for his vote cannot, by taking it out of his pocket, purge himself of his taint and restore his unbiased judgment. On this side of the Atlantic, one who has been counsel in a case cannot, after any lapse of time, sit in it as a judge. Nor can a judge at any time sit in a cause in which he may have, even indirectly, the slightest pecuniary interest. There are no decisions to this effect. We would search for them in vain. It is but the effort of human wisdom to guard against human frailties in those things as to which "we have no power of ourselves to help ourselves." As was said by the Court below:—

"A judge or juror is forbidden to sit in a case wherein a party litigant is closely related to him by blood or marriage. He will not be permitted to purge himself of his disqualification by announcing that he can and will act wholly uninfluenced by such relationship."

III. There remains but to notice the objection to the relief prayed, and to the decree.

We are entitled, under a will, to have money spent for our benefit. Circumstances have deprived us of part of the testator's machinery, namely, the exercise of a certain person's discretion. Of course, this does not deprive us of the bounty of the testator, and as machinery is wanted to direct its current, this court, upon the most trite and familiar principles of equitable jurisprudence, supplies other machinery in place of that which has been lost. We would be ashamed to cite authority for this. If any were needed beyond those cited by the Master on page 83, it may be suggested that this court is now, through its Master, in the case of Marvin *vs.* Drexel, carrying out a large real estate speculation on Broad street, some few squares below Christian street.

Then, too, the defendant complains that a Master, the choice of the Court, is not the choice of the testator. But no more is a Court the chosen interpreter of a testator's intention, and a Master is but the Court, acting necessarily, to some extent, by delegation. If analogy were wanted, we might again refer to the class of cases as to a trustee's consent to a marriage. When there exists "a fraud upon the power" to consent, the Court itself inquires, through its Master, whether the marriage be a proper one, and thus women are not left to starve for matrimony.

Further, the defendant complains that he still possesses the right to say how much shall be expended in building. But the question of site and expenditure are inseparable. Given the wealth of the Indies, and the question of expenditure—so much for site, and so much for the building—is insignificant. But if there be but a limited sum, large or small, the questions cannot be severed. At any rate, this court will seek for the best lights it can find, in order to carry out the testator's intention, as contained in his written will. *Non constat* that, after all, Broad and Christian streets may not be the best place. The case is the same as if the executor had died the day after the testator, and this Court will not suffer the latter's noble charity to fail by reason of an accident.

And, finally, the defendant complains that although Broad and Christian streets may be excluded from his choice, he may still be permitted to choose elsewhere. What then becomes of his promise that he will build there "and nowhere else"? It is this promise which has been "a fraud upon the power," and although he may absolve himself, a court of equity cannot absolve him.

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